Lim Foo Choy & Ors v Synn Cheong Development Sdn Bhd (in liquidation) & Anor

HIGH COURT (KUALA LUMPUR) — COMPANIES POST WINDING UP NO WA-28PW-300–04 OF 2019
NADZARIN WOK NORDIN JC
28 SEPTEMBER 2020

Companies and Corporations — Winding up — Liquidators — Liquidator filed notice of motion pursuant to ss 456, 483, 487(3) and 511 of Companies Act 2016 to enforce rights of first defendant — Whether necessary for liquidator to be in possession and custody of respective documents sought for in notice of motion

The first defendant ('D1') was a company in the business of maintenance of property and money lending. D1 was later wound up by way of a members voluntary winding up and one Wong Keng Leong was appointed as the liquidator of D1. The second defendant ('D2') was appointed as liquidator of D1 in place of Wong Keng Leong. Subsequently Augustine a/l TK James ('Augustine') was appointed by the court as liquidator of D1 in place of D2 who had passed away sometime in 2014. D1 was the developer and registered owner of the land ('the land') and had constructed a four-storey building in the early 1960's known as Tiong Nam Flats ('the flats') on the land. One Hong See Ching ('HSC') who was also the surveyor of the flats, had prior to the appointment of Augustine as the liquidator and sometime after the passing of D2, allegedly managed the affairs of the flats and accordingly took charge of maintenance of the flats and is in possession of the strata titles. Prior to HSC managing the flats, the late D2's daughter, one Song Huei Jin ('SHJ'), had after D2's death, apparently taken over and formed Tiong Nam Flats Management ('TNF Management') as a sole proprietor to ensure uninterrupted running and management of the flats. An agreement was also allegedly entered into between SHJ and HSC on 16 September 2015 for HSC as the majority shareholder of Tiong Nam Flats Management Sdn Bhd to take over and transfer the ownership of TNF Management to HSC from SHJ for a sum of RM60,000 wherein all operations of the flats were then transferred to TNF Management Sdn Bhd including collection of outstanding and current service charges, payment of quit rent, and fire insurance, amongst others, ('the 16 September 2015 agreement'). On 29 September 2017 Augustine's representatives had convened a meeting with HSC to discuss the strata titles held by HSC and in relation to him acting as the property manager of the flats and for him to surrender the management and affairs of the D1 to them. It was alleged that as there was no outcome from HSC, Augustine as the liquidator of D1 then approached the Commissioner of Buildings ('COB'). D1's liquidator had requested HSC to hand over the documents including the strata titles and so

had the COB. D1's liquidator had also asked HSH to file his proof of debt but HSH had to date refused to cooperate. Hence this notice of motion under encl 2 was filed by D1's liquidator pursuant to ss 456, 483, 487(3) and 511 of the Companies Act 2016 ('the CA 2016').

Held, granting the prayers in encl 2:

(1) The alleged 16 September 2015 agreement was merely an agreement between SHJ and HSC and did not bind D1 or the owners of the units in the flats in any way or manner. The said 16 September 2015 agreement did not and could not sanctify or legalise the actions of HSC in managing the flats and making any collections in respect of charges thereto or take any actions on behalf of D1 and/or the owner of the units' holders in the flats. Such an agreement was also in contravention of s 466 of the CA 2016 and could not confer the rights, responsibilities, interests and obligations of a liquidator upon any person nor the management of the flats done in contravention of the provisions of the Strata Management Act 2013 ('the Act'). Section 149 of the Act further strictly prohibited the contracting out of the Act, and consequently the 16 September 2015 agreement could not be enforced as it had the effect of making provisions which were contrary to the Act. The actions of SHJ and/or HSC to act and deal in matters pertaining to D1 and/or the flats were completely without authority and had no legal basis whatsoever, and any actions taken by either of them did not bind the current liquidator in any manner (see paras 42–44 & 46).

(2) The liquidator would not only be accountable but be burdened personally under the CA 2016 and the Act should he not be allowed to perform his functions and duties as the liquidator of D1 as required under the law. HSC did not have the right to hold onto such strata titles or to impose any conditions for its release when the law was clear that such strata titles must be deposited with the developer herein albeit via D1's liquidators, and that HSC could not be held to have a lien on such strata titles until his conditions for release were fulfilled. Further, any unilateral imposition of charges by HSC was not only void but also illegal under the Act. The exorbitant charges imposed on the units' owners of the flats therefore had no basis and were therefore void under the law (see paras 49, 53 & 55).

(3) It was indeed necessary for the liquidator to be in possession and custody of the respective documents sought for in the notice of motion at encl 2 hereof in order for the liquidator to perform its duties and responsibilities as a liquidator and officer of the court under not the CA 2016 but also the Act only for the benefit of D1 and the purchasers of the flats as well as the creditors of D1 (see para 64).

[Bahasa Malaysia summary

Defendan pertama ('D1') adalah sebuah syarikat dalam perniagaan penyelenggaraan hartanah dan pinjaman wang. D1 kemudiannya digulung melalui penggulungan sukarela ahli dan seorang Wong Keng Leong dilantik sebagai pelikuidasi D1. Defendan kedua ('D2') dilantik sebagai pelikuidasi D1 menggantikan Wong Keng Leong. Selepas itu Augustine a/l TK James ('Augustine') dilantik oleh mahkamah sebagai pelikuidasi D1 menggantikan D2 yang telah meninggal dunia pada tahun 2014. D1 adalah pemaju dan pemilik tanah yang berdaftar ('tanah') dan telah membina sebuah bangunan empat tingkat pada awal tahun 1960 yang dikenali sebagai Tiong Nam Flats ('flat') di tanah tersebut. Seorang Hong See Ching ('HSC') yang juga juruukur flat tersebut, sebelum pelantikan Augustine sebagai pelikuidasi dan suatu ketika setelah kematian D2, didakwa menguruskan urusan flat tersebut dan dengan itu bertanggungjawab atas penyelenggaraan flat dan memiliki hakmilik strata. Sebelum HSC menguruskan flat, anak perempuan mendiang D2, seorang Song Huei Jin ('SHJ'), setelah kematian D2, mengambil alih dan membentuk Tiong Nam Flats Management ('TNF Management') sebagai pemilik tunggal untuk memastikan pengurusan tanpa gangguan dan pengurusan flat. Perjanjian juga didakwa dimeterai antara SHJ dan HSC pada 16 September 2015 untuk HSC sebagai pemegang saham utama Tiong Nam Flats Management Sdn Bhd untuk mengambil alih dan memindahkan hak milik TNF Management kepada HSC daripada SHJ dengan jumlah RM60,000 di mana semua operasi flat tersebut kemudian dipindahkan ke TNF Management Sdn Bhd termasuk pungutan caj perkhidmatan tertunggak dan semasa, pembayaran cukai tanah, dan insurans kebakaran, antara lain, ('perjanjian 16 September 2015'). Pada 29 September 2017, wakil Augustine telah mengadakan pertemuan dengan HSC untuk membincangkan hakmilik strata yang dipegang oleh HSC dan berkaitan dengannya yang bertindak sebagai pengurus hartanah flat dan untuknya menyerahkan pengurusan dan urusan D1 kepada mereka. Didakwa bahawa kerana tidak ada hasil daripada HSC, Augustine sebagai pelikuidasi D1 kemudian mendekati Pesuruhjaya Bangunan ('COB'). Pelikuidasi D1 telah meminta HSC untuk menyerahkan dokumen termasuk hakmilik strata dan begitu juga COB. Pelikuidasi D1 juga meminta HSH untuk mengemukakan bukti keberhutangan tetapi HSH hingga kini enggan bekerjasama. Oleh itu, notis usul di bawah lampiran 2 difailkan oleh pelikuidasi D1 menurut ss 456, 483, 487(3) dan 511 Akta Syarikat 2016 ('AS 2016').

Diputuskan, membenarkan permohonan dalam lampiran 2:

(1) Perjanjian 16 September 2015 yang didakwa hanyalah perjanjian antara SHJ dan HSC dan tidak mengikat D1 atau pemilik unit flat dengan apa cara sekali pun. Perjanjian 16 September 2015 tersebut tidak dan tidak dapat membenarkan atau mengesahkan tindakan HSC dalam menguruskan flat dan membuat kutipan berkenaan dengan caj yang

dikenakan atau mengambil tindakan atas nama D1 dan/atau pemilik pemegang unit flat. Perjanjian itu juga bertentangan dengan s 466 AS 2016 dan tidak dapat memberikan hak, tanggungjawab, kepentingan dan kewajipan pelikuidasi kepada mana-mana orang atau pengurusan flat yang dilakukan bertentangan dengan peruntukan Akta Pengurusan Strata 2013 ('Akta'). Seksyen 149 Akta melarang keras membuat kontrak luar daripada Akta tersebut, dan akibatnya perjanjian 16 September 2015 tidak dapat dikuatkuasakan kerana mempunyai kesan membuat peruntukan yang bertentangan dengan Akta. Tindakan SHJ dan/atau HSC untuk bertindak dan menangani hal-hal yang berkaitan dengan D1 dan/atau flat sepenuhnya tanpa kuasa dan tidak memiliki dasar undang-undang sama sekali, dan tindakan yang diambil oleh salah satu dari mereka tidak mengikat pelikuidasi semasa dengan cara apa pun (lihat perenggan 42–44 & 46).

(2) Pelikuidasi tidak hanya dapat dipertanggungjawabkan tetapi dibebankan secara pribadi di bawah AS 2016 dan Akta sekiranya dia tidak diizinkan untuk menjalankan fungsi dan tugasnya sebagai pelikuidasi D1 sebagaimana yang dikehendaki oleh undang-undang. HSC tidak berhak untuk memegang hakmilik strata seperti itu atau untuk mengenakan syarat untuk pelepasannya ketika undang-undang jelas bahawa hakmilik strata tersebut harus diserahkan kepada pemaju di sini melalui likuidator D1, dan HSC tidak dapat diputuskan untuk mempunyai lien di atas hakmilik strata sehinggalah syaratnya untuk pelepasan dipenuhi. Selanjutnya, setiap pengenaan caj secara sepihak oleh HSC tidak hanya terbatal tetapi juga tidak sah di bawah Akta. Oleh itu, caj yang terlalu tinggi yang dikenakan kepada pemilik unit flat tidak mempunyai asas dan oleh itu tidak sah di bawah undang-undang (lihat perenggan 49, 53 & 55).

(3) Sememangnya perlu bagi pelikuidasi untuk memiliki dan menjaga dokumen yang dipohon dalam notis usul di lampiran 2 ini agar pelikuidasi dapat menjalankan tugas dan tanggungjawabnya sebagai pelikuidasi dan pegawai mahkamah di bawah AS 2016 tetapi juga Akta hanya untuk kepentingan D1 dan pembeli flat serta pemiutang D1 (lihat perenggan 64).]

Cases referred to

JB Precision Moulding Industries Sdn Bhd (in liquidation) v Sime Diamond Leasing (Malaysia) Sdn Bhd [1995] 3 MLJ 718, HC (refd)

Messrs Roland Cheng & Co v Konkamaju Sdn Bhd [2014] 1 MLJ 894, CA (refd)

Torita Rubber Works Sdn Bhd v Chew Chong Eu [2009] 5 MLJ 208, HC (distd)

Legislation referred to

Companies Act 2016 ss 456, 446, 483, 483(5), 487(3), 511, Part 4, Division 1, Subdivision 4

Licensed Land Surveyors Regulations 2011 r 29(1)(g), Thirteenth Schedule Strata Management Act 2013 ss 2, 9, 9(3), (5), 149, Part IV

S Dhanaraj (Hakem Arabi) for the plaintiffs.
Pamela Ephraim (Ephraim & Assoc) for the first defendant's liquidator.
Nurul Hafeeza (CW Loh & Assoc) for Hong See Ching.

Nadzarin Wok Nordin JC:

[1] The notice of motion dated 25 April 2019 ('NOM') under encl 2 before this court is filed by the liquidator of D1, Synn Cheong Development Sdn Bhd, pursuant to ss 456, 483, 487(3) and 511 of the Companies Act 2016 ('the CA 2016') seeking one Hong See Ching ('HSC') to, inter alia:

(a) handover all original strata titles held by HSH c/o JW Survey management in relation to the Land and the Tiong Nam Flats ('flats'), mentioned in more detail hereinafter, all documents, titles, maintenance charges to Mr Augustine a/l TK James (Mr Augustine) of Radiant Consulting Asia Sdn Bhd, the court appointed liquidator of D1 ('D1's liquidator');

(b) be directed to convey, deliver and surrender all principal sale and purchase agreements and all related documents pertaining to D1 and the flats in his custody together with the full list of names, strata title numbers, title number, building number, floor number, parcel number, strata registration block number, complete owners list and register of owners, names of purchasers where strata titles have already been surrendered to D1 for purposes of verification by the liquidator;

(c) to produce his letter of appointment from the second defendant herein, one Lim Siew Tin (D2) or the first liquidator, allegedly appointing him to manage the affairs of D1 and as property manager of the flats;

(d) in his capacity as property manager be directed to convey, deliver and/or surrender all audited accounts, receipts and proof of payments received from the purchasers/owners for the maintenance charges collected for the flats from 2009;

(e) to surrender the management of the flats and cease management of the flats and shall be prevented form dealing with the purchasers/owners and collect any monies and payment from the said purchasers/owners;

(f) that D1's liquidator be at liberty to appoint any licensed property manager as the property manager of the flats in place of HSH c/o JW Survey Management;

(g) any payments received for maintenance charges from 2009 to-date shall be accounted for and transferred to D1;

(h) that Public Bank Bhd (PBB) shall produce and/or deliver the bank statements from period 2009 to date of JW Survey Management Account No 3188503725 to the liquidator;

(i) be directed to convey, deliver and produce the layout plan of the flats, the location of the units, complete details and addresses of each. Unity, the certificate of fitness of the flats and full details of the flats to which D1 is entitled to;

(j) be directed to lodge his proof of debt (POD) with the liquidator for all expenses incurred by him for the application for strata titles of the flats and all incidental costs therein with supporting documents and receipts;

(k) to furnish his surveyors fees in accordance with the Board of Surveyors approved fee structure;

(l) in event HSH fails to deliver the original strata titles, D1's liquidator shall be entitled to apply for the replacement title in the Kuala Lumpur Land Office and the costs shall be borne solely by HSH;

(m) deliver a list of consisting of purchasers who have already paid for the maintenance fees and the list of those who have yet; and

(n) all information and/or documents be delivered and/or furnished by the relevant parties to D1 within 14 days from the date of this order.

BACKGROUND FACTS

[2] The first defendant company, Synn Cheong Development Sdn Bhd (in liquidation) (D1) was a company in the business of maintenance of property and money lending. D1 was later wound up by way of a members voluntary winding up on 27 November 1998 and one Mr Wong Keng Leong was appointed as the liquidator of D1.

[3] On 17 May 2001 one Lim Siew Tin, the second defendant herein (D2) was appointed as liquidator of the first defendant in place of Mr Wong Keng Leong. Subsequently Mr Augustine a/l TK James ('Mr Augustine') of Radiant Consulting Asia Sdn Bhd who was appointed by the court as liquidator of D1 on 6 September 2017 in place of D2 who had passed away sometime in 2014.

[4] D1 is the developer and registered owner of the land known as Lots 791 and 1754–1763, Section 46, Town of Kuala Lumpur, Wilayah Persekutuan ('land') and had constructed a four storey building in the early 1960's known as 'Tiong Nam flats' (flats) on the land.

[5] The ground floor of the flats were sold to the purchasers in the early 1960's in the region of RM19,000 to RM19,500 depending on the parcel while the purchase price for the second to fourth floors were in the region of RM11,000 to RM11,500.

[6] HSC who was also the surveyor of the flats, had prior to the appointment of Mr Augustine as the liquidator and sometime after the passing of D2, allegedly managed the affairs of the flats and accordingly took charge of maintenance of the flats and is in possession of the strata titles.

[7] Prior to HSC managing the flats, the late D2's daughter, one Song Huei Jin ('SHJ'), had after D2's death, apparently taken over and formed Tiong Nam Flats Management (TNF Management) as a sole proprietor to ensure uninterrupted running and management of the flats.

[8] An agreement was also allegedly entered into between SHJ and HSH on 16 September 2015 for HSH as the majority shareholder of Tiong Nam Flats Management Sdn Bhd (TNF Management SB) to take over and transfer the ownership of TNF Management to HSH from SHJ for a sum of RM60,000 wherein all operations of the flats were then transferred to TNF Management SB including collection of outstanding and current service charges, payment of quit rent, and fire insurance amongst others (16 September 2015 agreement).

[9] On 29 September 2017 Mr Augustine's representatives had convened a meeting with HSC to discuss the strata titles held by HSC and in relation to him acting as the property manager of the flats and for him to surrender the management and affairs of the D1 to them.

[10] It is alleged that as there was no outcome from HSC, Mr Augustine as the liquidator of D1 then approached the Commissioner of Buildings ('COB').

[11] At a meeting held on 21 March 2018, the COB had issued a letter to HSC on 24 April 2018 requesting for amongst others:

(a) that HSC deliver the statement of accounts pertaining to the management of the flats till 30 September 2017;

(b) the balance maintenance charges collected as at 30 September 2017; and

(c) a detailed calculation of the charges imposed to the parcel owners for the to obtain their strata title.

[12] Thereafter another letter was issued by the COB to HSC on 30 August 2018 pursuant to a meeting dated 1 June 2018 that:

(a) HSC is only to collect the maintenance charges till 30 June 2018;

(b) thereafter all the collection charges shall be done by D1's liquidator; and

(c) HSC is to inform the COB in relation to the handover and collection of maintenance of the flats within seven days of their letter and/or by 15 September 2018 failing which the maintenance and collection of the flats shall be automatically be transferred to D1's liquidator.

[13] On 5 September 2018 HSC replied to the COB confirming that all collection for maintenance of the flats had stopped as at 30 June 2018 but was silent to the other requests.

[14] D1's liquidator had also conducted a meeting with the pro tem committee of the flats over the maintenance charges and surrender of titles.

[15] Pursuant to the meeting with the COB, the pro tem committee and HSC, D1's liquidator had taken steps to appoint ECS Valuation & Property Consultancy Sdn Bhd to act as the property manager who was then replaced by AFZ Realty Sdn Bhd.

[16] D1's liquidator has also requested HSC to hand over the said documents including the strata titles and so has the COB. D1's liquidator has also asked HSH to file his POD but HSH has todate refused to cooperate.

[17] HSH has claimed and has since collected RM18,000 from each of the ground floor purchasers and RM3,000 from the 2nd–4th floor purchasers.

THE LIQUIDATOR'S SUBMISSIONS

[18] D1's liquidator alleges that HSC has placed himself in a conflict of interest, there is a lack of accountability, transparency and independence. L also states that HSC was only appointed as a surveyor by D1 on 19 August 1992 prior to the winding up of D1 and that HSC's appointment thereto was sanctioned by Lim Siew Tin, the second liquidator of D1. L further states that HSC's scope was limited to only matters dealing with the strata title and performing surveyor's work and nothing more (see exhs HSC4 and HSC6).

[19] D1's liquidator submits that both HSC and Ms Song Huei Jin, the daughter of the late D2 decided to take on the management of the flats and made no attempts to fill the vacancy of the second liquidator with the appointment of another liquidator as required under the CA 2016 but had instead taken matters into their own hands and breached the provisions of the CA 2016.

[20] D1's liquidator submits that nowhere does HSC shows his appointment was sanctioned by D2 or with the consent of the owners of the flats or the creditors of D1.

[21] It is also alleged that the flats in depilated condition, HSH not using maintenance collected to maintain flats and that HSH has been charging 8% interest as late payment backdating until five to six years.

[22] D1's liquidator also contends that HSH has taken matters into his own hands since collected RM501,000 but has paid only RM128,994.37 towards issuance of Strata and submission of strata application.

[23] It is submitted by D1's liquidator that HSH has not submitted any audited accounts for the excessive amounts collected on behalf of D1 and that he has fraudulently collected the monies on behalf of D1 as he is only the surveyor and not the liquidator of D1. HSH has not been transparent to Purchasers and that there has been no accountability on the part of HSH.

[24] It is also submitted by D1's liquidator that HSH does not have authority to transfer strata titles to purchasers and that since strata titles are still in name of D1, the unit purchasers in the flats are unable to transfer or refinance their units.

[25] D1's liquidator further submits that the duty of liquidator here would be that of developer.

[26] D1's liquidator also contends that HSH has two companies dealing as land licensed surveyors ie Jurukur Wilayah and JW Survey Management in contravention of the land Surveyors Regulations.

[27] It is also further alleged by D1's liquidator that, inter alia:

(a) HSH has failed to furnish an audited set of accounts of the maintenance charges received by him and instead produced an unaudited statement of accounts claiming unsubstantiated losses of RM239,000;

(b) SHJ was periodically paid RM1,000 per month as compensation from 30 June 2016–December 2020 without any justification; and

(c) HSH had claiming overheads and making deductions of RM8,618 on a monthly basis.

[28] D1's liquidator has also exhibited photographs of the alleged state of disrepair of the flats which were alleged to be in a deplorable state and condition.

HSH'S SUBMISSIONS

[29] It is alleged by HSC that after the death of D2, all bank accounts of the flats were frozen and D2's daughter, one Song Huei Jin (SHJ), took it upon herself and without any authority to do so took over and formed Tiong Nam Flats Management (TNF Management) as a sole proprietor to ensure uninterrupted running and management of the flats which was later taken over by him, apparently due to being forced to do so.

[30] HSC also alleges that he has been practising as a land licensed surveyor for the past 30 years and that 'he cannot be denied of all his soil and toil over the past 30 years in the Tiong Nam Flat Projects and to handover the strata titles free of charge to the liquidator is unreasonable'.

[31] HSH submits that the NOM is an abuse of process as D1's liquidator has acted in conflict of interest as he is acting for his own benefit as he has an ulterior motive by ripping off the fees due to HSH and that of the owners/buyers and not in the interest of the company and is a breach of his fiduciary duties as the liquidator must remain impartial.

[32] HSH also contends that the first to fourth plaintiffs are neither creditors nor contributories to D1.

THE COURTS FINDINGS

[33] In the context of the factual matrix as presented to this court, it is incumbent to firstly refer to the Strata Management Act 2013 which lays out the duties and functions of the various bodies who are obligated, empowered and/or authorised to act under the said Act to, inter alia, manage common property in sub divided buildings.

[34] The said Strata Management Act 2013 also commonly referred to as Act 737, is divided into various parts which governs the different stages of any common property or limited common property, as defined under the said Act, with regards a 'development area' which is defined under the said Act to include: (a) in relation to a building or land intended for subdivision into parcels; and (b) in relation to a subdivided building or land, means any alienated land held as one lot under final title (whether Registry or Land Office title) on which the subdivided building or land is developed.

[35] Under s 2 of the Strata Management Act 2013 a 'developer' is defined as:

(a) in relation to a development area, means any person or body of persons, by whatever name described, who develops any land for the purpose of residential, commercial or industrial use, or a combination of such uses; and

(b) in relation to a subdivided building or land, includes the original proprietor of the lot before the subdivision, and includes the executors, administrators and successors-in-title and permitted assigns of such person or body of persons, and in a case where the person or body of persons is under liquidation, includes such person or body appointed by a court of competent jurisdiction to be the provisional liquidator or liquidator;

[36] As can be seen from the said definition of a 'developer', this will include a liquidator where the developer has been wound up and is thereafter under liquidation.

[37] There is a duty on the developer under Part IV of the said Strata Management Act 2013 to comply with s 9 of the Act which deals with the duties and powers of a developer during the 'Developer's management period' which is the management by a developer before a joint management body is established which includes, inter alia:

to maintain and manage properly any building or land intended for subdivision into parcels and the common property.

(2) Without prejudice to the generality of subsection (1), the duties of the developer during the developer's management period shall be as follows:

(a) to determine and impose the Charges to be deposited into the maintenance account;

(b) to determine and impose the contribution to the sinking fund to be deposited into the sinking fund account;

(c) to effect insurance according to this act;

And under sub-s (3) thereof:

(3) The powers of the developer during the developer's management period shall be as follows:

(a) to collect the Charges from the parcel owners in proportion to the allocated share units of their respective parcels;

(b) to collect the contribution to the sinking fund from the parcel owners;

(c) to authorize expenditure for the carrying out of maintenance and managementof the buildings or lands intended for subdivision into parcels and the common property;

A

(d) to recover from any parcel owner any sum expended by the developer in respect of that parcel in complying with any such notice or order referred to under paragraph (2)(d); and

(e) to do all things reasonably necessary for the performance of its duties under this act.

B

[38] This court hereto agrees with D1's liquidator, that that such duty of a developer, in this case being D1 as the developer of the flats, would now befall upon the liquidator of D1 herein and that the liquidator would have to comply with the said s 9 Strata Management Act 2013. It is also incumbent to note that the said s 9 at sub-s 9(5) thereof states that:

C

(5) Any developer who fails to comply with subsection (1), (2) or (4) commits an offence and shall, on conviction, be liable to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both.

D

[39] Such a penalty imposed on the developer under the said sub-s 9(5) would consequently now fall upon the liquidator of D1 as the developer of the flats.

E

[40] This court would also highlight that Part 4, Division 1, Subdivision 4 of the CA 2016, under s 446 of the CA 2016 thereto which specifically provides in a members voluntary winding up position, that in the event of a death of an office of a liquidator appointed by the company, the company may fill the vacancy subject to any arrangement with its creditors. This section reads as follows:

F

(1) If a vacancy occurs by death, resignation, removal or otherwise in the office of a liquidator appointed by the company, the company in a meeting of members may fill the vacancy, subject to any arrangement with its creditors.

G

(2) For the purposes of subsection (1), a meeting may be convened by any contributory or, if there is more than one liquidator, by the continuing liquidators.

(3) The meeting shall be held in a manner provided by this Act or by the constitution, or in such manner as may be determined by the Court, on application by any contributory or by the continuing liquidators.

H

[41] The court notes based on the factual matrix in the matter before it, which this court observes from the available material placed before this court, that no such compliance with s 446 of the CA 2016 was adhered to and which then resulted in the current liquidator for D1 being appointed by way of a court order.

I

[42] This court holds that the alleged 16 September 2015 agreement as exhibited in HSC13 of HSC's affidavit in reply affirmed on 1 July 2019 at

encl 5 hereto, is merely an agreement between SHJ and HSH and does not bind D1 or the owners of the units in the flats in any way or manner. I further hold that the said 16 September 2015 agreement does not and cannot sanctify or legalise the actions of HSH in managing the flats and making any collections in respect of charges thereto or take any actions on behalf of D1 and/or the owner of the units holders in the flats.

[43] I also hold that such an agreement is also in contravention of s 466 of the CA 2016 which was highlighted earlier and cannot confer the rights, responsibilities, interests and obligations of a liquidator upon any person nor the management of the flats done in contravention of the provisions of the Strata Management Act, which latter came into force on 1 June 2015 vide PU (B)237/2015 in the Federal Territory of Kuala Lumpur.

[44] I also wish to stress that s 149 of the Strata Management Act 2013 further strictly prohibits the contracting out of the said Act, and consequently the 16 September 2015 agreement cannot be enforced as it has the effect of making provisions which are contrary to the said Act 757. I now for the sake of completeness quote the said section which reads as follows:

> (1) The provisions of this actshall have effect notwithstanding any stipulation to the contrary in any agreement, contract or arrangement entered into after the commencement of this act.
>
> (2) No agreement, contract or arrangement, whether oral or wholly or partly in writing, entered into after the commencement of this act shall operate to annul, vary or exclude any of the provisions of this act.

[45] Any books and/or records of D1 has also by virtue of s 483 of the CA 2016 to be deposited by HSH to the liquidator herein which mandates that the custody and vesting of a company under liquidation is to be placed with the liquidator. See s 483 of the CA 2016 which reads:

> (1) Where an interim liquidator has been appointed or a winding up order has been made, the interim liquidator or liquidator shall forthwith take into his custody or under his control all the property to which the company is or appears to be entitled.

[46] It is therefore clear from the above that neither SHJ nor HSH had obtained the required sanction in accordance with CA 2016 to act in place of D2 upon her death and/or had acted contrary to the provisions of the Strata Management Act 2013, in particular, and accordingly the actions of SHJ and/or HSH subsequently were illegal and therefore void ab initio. In other words, this court finds that the actions of SHJ and/or HSH to act and deal in matters pertaining to D1 and/or the flats were completely without authority and had no legal basis whatsoever, and any actions taken by either of them does not bind the current liquidator in any manner.

[47] It is also to be noted that at the said sub-s 483(5) of the CA 2016:

> (5) A liquidator who contravenes the requirement of subsection (3) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and in the case of a continuing offence, to a further fine not exceeding five hundred ringgit for each day during which the offence continues after conviction.

[48] In *JB Precision Moulding Industries Sdn Bhd (in liquidation) v Sime Diamond Leasing (Malaysia) Sdn Bhd* [1995] 3 MLJ 718 where the court held that:

> the liquidator is required under s. 233 of the Companies Act to take into custody or under his control all the property to which the applicant company is or appears to be entitled, failing which, he would be committing an offence under the Act and as such, I am of the view that the respondent, under the circumstances, cannot prevent him from carrying out his duty.

[49] Accordingly, this court thus finds that the liquidator will not only be accountable but be burdened personally under the CA 2016 and the Strata Management Act 2013 should he not be allowed to perform his functions and duties as the liquidator of D1 as required under the law.

[50] As to HSH's contention that 'he cannot be denied of all his soil and toil over the past 30 years in the Tiong Nam Flat Projects and to handover the strata titles free of charge to the Liquidator is unreasonable', with respect, the court finds this contention is totally untenable under the law for the reasons aforementioned as his acts are not only contrary to the CA 2016 but also the Strata Management Act 2013. HSH cannot expect to benefit in a way which the law cannot recognise nor accept such actions which are not in accordance with the law. This court cannot condone the actions of HSH as he had no legal authority to act in the manner he has done in so far as the management of the flats is concerned, more so when such management should have either been conducted by D1 or the owners of the units of the flats, as the case maybe, and that too in accordance with the applicable law. That fact is compounded by the reason that D1 has been voluntarily wound up since 27 November 1998 and all matters concerning D1 in liquidation is then vested with the liquidators of D1 thereafter which for the present purposes would mean Mr Augustine the current liquidator of D1.

[51] Once HSH's job scope as a surveyor to apply for strata titles in respect of the flats have been completed, his functions therein cease and the liquidator of D1 should then take over and assume all responsibility thereafter, which the liquidator herein has in this courts considered view attempted to do.

[52] HSH's actions beyond his scope of works was taken upon by HSH himself and HSH cannot now compel either the liquidator of D1 or the units

owners of the flats to compensate him for acts which have never been approved by either D1's liquidator or the unit owners in the flats. To now attempt to seek compensation and to hold on to the respective strata titles amounts to a ransom imposed upon both the liquidator and/or the unit owners in the flats.

[53] I further hold that HSH does not have the right to hold onto such strata titles or to impose any conditions for its release when the law is clear that such strata titles must be deposited with the developer herein albeit via D1's liquidators, and that HSH cannot be held to have a lien on such strata titles until his conditions for release are fulfilled. The reliance on the Court of Appeal case of *Messrs Roland Cheng & Co v Konkamaju Sdn Bhd* [2014] 1 MLJ 894, by HSH is, with respect, taken out of context as the right to the lien therein was given to the solicitors therein with regards to legal fees which the solicitors were legally entitled to as opposed to herein where I have found that HSH has not complied with the law in imposing the fees and charges.

[54] I agree with the liquidator that from the facts, HSC via Jurukur Wilayah was only appointed to apply for the strata titles, see exh HSC1 in encl 5 being a letter from D1 dated 20 June 1988 and the subsequent letter of appointment dated 20 September 2010 from D2 as liquidator of D1 at that time at exh HSC6 in encl 5 herein, and that upon his job scope therein being completed, HSC is obliged to hand over and release the said strata titles to the liquidator for the liquidator to then take over and carry out his obligations under the CA 2016 and to complete the task of, inter alia, transferring the said respective strata titles to the individual unit owners in the flats as required under and pursuant to the Strata Management Act 2013. Any acts of HSC in holding the said strata titles is therefore not in accordance with the law and is in fact illegal and in contravention of the CA 2016 and the Strata Management Act 2013.

[55] This court further holds that any unilateral imposition of charges by HSC is not only void but also illegal under the Strata Management Act 2013. I further find that the exorbitant charges imposed on the units owners of the flats therefore have no basis and are therefore void under the law. For HSH to charge the sum of RM18,000 from the purchasers of the ground floor units in the flats and RM3,000 from the purchasers of the units in the second to fourth floors of the flats, totalling all in RM900,000 as per the invoice from JW Survey Management as per exh HSC10 in HSH's affidavit in reply at encl 5 is, in the absence of any evidence to the contrary, rather steep to say the least and does not appear to be in accordance with the charges which a land surveyor may impose under the Licensed Land Surveyors Regulations 2011. Any fees to be imposed by HSH must be only for the work done in applying for the said strata titles and not, as contended by HSH, to take into account any inflation rate and current market value of the properties.

[56] It is indeed sad that some of the unit owners in the flats have been put to unnecessary inconvenience as a result of the high charges imposed which as mentioned were never done with their consent. An example of this can be found in the imposition of charges by HSH to the unit owner of No 802, Ground Floor, one Yap Chean Lee (Yap), wherein the said Yap has to pay to HSH the sum of RM18,000 for the strata title and RM26,447.91 being alleged arrears in maintenance charges.

[57] I have been referred to by Learned counsel for the liquidator to the Licensed Land Surveyors Regulations 2011 and the Thirteenth Schedule therein with regards the fees or costs chargeable by a surveyor not being in accordance with the said schedule save where the same has been agreed in writing by the client, and I have after reading the said r 29(1)(g) which reads:

> (g) not be charging in respect of professional services rendered to his client, of fees or costs not in accordance with the Schedule in these regulations except where the client agreed in writing that the amount to be charged is more than the amount prescribed in the Thirteenth Schedule;' agree that in the absence of HSH producing to this Court such agreement in writing as to the fee structure, HSH has to comply with the scale fee in the 13th schedule of the Licensed Land Surveyors Regulations 2011.

[58] I have also found that HSH has, as submitted by the liquidator, two companies dealing as land licensed surveyors ie Jurukur Wilayah and JW Survey Management as seen in exh HSH 10 in encl 5 and which can be seen in the letters dated 1 November 2013 and 1 March 2011 and has used JW Survey Management to issue the invoice dated 18 November 2013, which I hold had no authority to do so as the appointment, if any, as land surveyor by D2 was to Jurukur Wilayah and not JW Survey Management.

[59] I must also stress that even, and I repeat it with a very heavy heart indeed, 'even' if HSH was paid the charges for the strata titles which he claims he is owed, HSH is in no position to effect a transfer of the respective strata titles to the unit owners of the flats and must still hand over the said titles to the liquidator who is the only legal successor in title to D1 as the company in liquidation and thereto the only person/entity empowered under the law to then transfer the said titles on behalf of the developer under liquidation to the respective unit owners of the flats.

[60] This court also finds that the liquidator by way of its letter dated 24 October 2018 and the COB has requested HSC to hand over the said documents including the strata titles to the liquidator and for HSH to file his POD but HSH has in its reply dated 15 November 2018 refused to cooperate, as seen in exh AJ9 of encl 1 being the liquidators AIS affirmed by Mr James on 22 April 2019.

[61] Let me at this juncture address HSH's contention that the liquidator must remain impartial where he has quoted and relied on *Torita Rubber Works Sdn Bhd v Chew Chong Eu* [2009] 5 MLJ 208 which case therein concerned an appeal from the decision of the respondent liquidator in rejecting the applicant's proof of debt, where the applicant was at all material times a creditor of the company and the full details of the company's debt that was owing to the applicant, together with the relevant supporting documents had been furnished to the respondent in the applicant's proof of debt. Notwithstanding this, the respondent had rejected in full the applicant's proof of debt without any valid reason.

[62] I find that reliance on this case of *Torita Rubber Works Sdn Bhd* can be easily distinguished from the facts before me and that the factual matrix of the matter herein is entirely different from that in Torita, and that the 'one sided' comment by the learned judge therein was limited to the facts of that case whilst in the matter before me, I find that the reliance on the statement by the learned judge in Torita is misconceived to say the least as here the liquidator is not rejecting any POD of HSH but instead has to the contrary asked HSH to submit his POD and is seeking to enforce the rights of D1 which can be seen in the prayers seeked in the NOM.

DECISION

[63] The liquidator herein has applied to this court pursuant to ss 456, 483, 487(3) and 511.

Section 456 of the CA 2016 in essence states:

> *The liquidator may exercise any power and duty specified under the Eleventh Schedule in a voluntary winding up.*

Whilst s 487(3) of the CA 2016 on the other hand states:

> (3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

And s 511 CA 2016 which reads:

> The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator or interim liquidator forthwith or within such time as the Court directs any money, property, books and papers in his hands to which the company is prima facie entitled.

[64] After evaluating all the evidence before me, I have in the circumstances of the matter found that it is indeed necessary for the liquidator to be in possession and custody of the respective documents sought for in the NOM at encl 2 hereof in order for the liquidator to perform its duties and

responsibilities as a liquidator and officer of the court under not the CAA 2016 but also the Strata Management Act 2013 only for the benefit of D1 and the purchasers of the flats as well as the creditors of D1, wherefore I hereby grant order in terms of:

(a) prayers 1–7, 9, 11, 12, 13 and 14 therein;

(b) for prayer 8, I have allowed the oral application by D1's liquidator to amend the same to read that the liquidator of D1 shall apply to PBB for the bank to produce and deliver the bank's statements from 2009–2018, JW Survey Management a/c No 3188503725 to Mr Augustine, the court appointed liquidator of D1;

(c) prayer 10 to add 'for HSH to lodge his POD within 14 days from the date of this order';

(d) and after hearing parties submit on the costs, for prayer 15, HSH to pay the costs of RM10,000 awarded to each, being D1's liquidator and to the plaintiffs, the latter of which shall be paid costs collectively/jointly and such costs to be paid forthwith.

Prayers in encl 2 granted.

Reported by Nabilah Syahida Abdullah Salleh